

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1085

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1085

UNITED STATES OF AMERICA,
Appellee,
VS
SEBASTIAN INTERSIMONE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT

SEBASTIAN INTERSIMONE, pro se
Box PMB-04529-158
Atlanta, Georgia 30315



TABLE OF CITATIONS

<u>CASES CITED</u>	<u>PAGE</u>
<u>MacKenna v. Ellis</u> , 280 F.2d 592 (5th Cir.1960)	8
<u>People v. Williams</u> , 2 Cal. 3d 894, 471 P.2d 1008 (1970). . .	9
<u>Ray v. Rose</u> , 491 F.2d 285 (6th Cir.1974)	4
<u>Reece v. Georgia</u> , 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. (1955)	6
<u>United States v. DeCoster</u> , 487 F.2d 1197, 1204 (D.C.C.A. 1973)	5
<u>United States v. McCord</u> , 509 F.2d 334 (D.C.C.A. 1974) . . .	4
ABA Standards	
3.5(a)	11
1.6(b)	11

ARGUMENT

I, Sebastian Intersimone, pro se, respectfully request the Honorable Judges of the Second Circuit Court of Appeals to consider this my Supplemental Reply Brief along with any affidavits and exhibits attached hereto.

The "CONFLICT OF INTEREST" issue which was raised in my brief and is further expounded upon here, is intended to present to this Court the complete, and total self-interest of my trial attorney David V. Keegan, after he reported the Petit Juror, William T. Keno, and the "Brightman Conversation", on September 18th, 19th and 20th of 1976.

At that time Mr. Keegan became an arm of the U.S. Attorney's Office, as Chief Investigator within my "CAMP" during the trial and after my conviction in Case No. 76 Cr 324. The "SEALED TRANSCRIPT" will reveal exactly the truth of my allegations. Part of these Sealed Trial Transcripts were inadvertently sent to me by one of my attorneys and is attached hereto as Exhibit "A".

To further show Mr. Keegan's state of mind and fear of his own precarious position in this entire Jury Issue, he told certain co-counsel during the day, September 20th, 1976, that "Benny was in for further prosecution, and better he go to jail than David Keegan". I had heard of this remark and statement during trial but refused to believe it. Now a co-counsel has written a statement to this fact as the people that Mr. Keegan expressed his feelings to.

(See Exhibit "B"). Her name is Nancy Rosner, Esq., Attorney for a co-defendant, Frank Moten, in 76 Cr 324.

Finally, after the conviction I was placed in detention at the "MCI" in New York awaiting transfer to the Federal Authorities. During this period, I was visited by Mr. Keegan without paper, pencil, or any other legal documents. His sole interest at the time of his visit was obtaining information that I might have about the on-going investigation into the jury-tampering charges and the names of people that I might know involved. I assured Mr. Keegan that I knew nothing more about this than he.

Being one of twenty-two (22) defendants in trial in 76 Cr 324, much of the testimony against me was not presented until after September 20, 1976. Because of the question of the jury which was reported by Mr. Keegan on the prior weekend (September 18th and 19th), Mr. Keegan's representation became totally ineffective and was rendered ineffective because of his conflict of interest.

BACKGROUND AND FACTS

On or about September 20th or 21st Mr. Keegan and I, during one of the recesses walked into the corridor of the Courtroom. Mr. Keegan expressed a desire to be alone so that he and I might talk. I, of course, complied since Mr. Keegan had displayed severe tension to such a degree during this period that he had began taking 25 miligrams of librium three to four times a day whereas he had

been taking 10 miligrams of librium three to four times a day prior to this period. We walked to the end of this cooridor where there were benches. There were also a set of doors to a new courtroom which Mr. Keegan decided to enter. I followed until the door was open enough for me to see Assistant United States Attorney, Mr. Daniel Beller, sitting on the first bench inside and obviously waiting for us. I stopped and looked at Mr. Keegan and began to withdraw from the doorway when Mr. Keegan, my attorney, held my arm and said, "Please, Mr. Beller just wants to ask you some questions about the Jury. It's for Yolanda's (my sister) sake." I reluctantly and curiously entered the courtroom with just Mr. Beller and Mr. Keegan present. Mr. Beller asked me to sit down in this chair for a moment.

Mr. Beller began relating all that he had put into (his effort) the case; that he suffered and worked so hard for approximately one year in its preparation for this trial that he said, "If I have to lose this case, I wouldn't want to lose it that way." (meaning via a jury tampering affair).

I looked at my attorney, Mr. Keegan and he said to me, "If you know anything, tell Mr. Beller, he will guarantee you an acquittal!" I turned to Mr. Beller who nodded his head affirmatively in confirmation of this agreement. I very sincerely and solemnly informed Mr. Beller and Mr. Keegan that at no time had I conspired with any of the defendants regarding "reaching a juror". I also told Mr. Beller that I considered Mr. Keegan to be in his corner in this entire matter of the "jury tampering affair" and also during my trial.

Mr. Keegan never advised me that Mr. Beller would be in this courtroom for a conference. I was never told of my rights to remain silent by my attorney, rather I was encouraged to talk. When Mr. Keegan in his estimation, felt I would not (cooperate), he was very obviously not my attorney in the true sense of this word i.e. he ceased to adequately and effectively represent me.

INEFFECTIVENESS DUE TO CONFLICT

It is undisputed that trial counsel may be rendered ineffective due to a conflict of interest between trial counsel and his client. See Ray vs. Rose, 491 F.2d 285 (6th Cir.1974). Appellant also calls the court's attention to United States vs. McCord, 509 F.2d 334 (D.C.C.A. 1974), holding that disloyalty or conflict of interest may, if substantial and proven, result in the denial of effective assistance of counsel and contravention of the Sixth Amendment.

The Conflict of Interest created by the above described events and the subsequent grand jury investigation at which Mr. Keegan was to appear and tell all he knew or be held in contempt, ("Better Benny go to jail than me"), caused Mr. Keegan to inadequately represent me by totally failing to cross-examine government witnesses.

1. Mr. Donald Ferrarone, Coordinator for "Centac" Region 8. Mr. Ferrarone was at my home with B.C.I. Detective Michael Mahoney after my indictment and prior to my arrest. I had a dispute with a local resident in Accord, New York and at the urging of State Troopers Douglas Diamond and James Kelly, had sworn out legal action. Mr. Mahoney and Mr. Ferrarone posed as a B.C.I. Detective came to my house to iron out this dispute. I told Mr. Ferrarone he was unfamiliar

to me and asked if he was a lieutenant. He replied that I had just promoted him. Mr. Keegan was completely aware of this fact and yet at my trial when Mr. Ferrarone took the stand failed to question him at all especially as to why Mr. Ferrarone, who knew I had been indicted on a very serious Federal Narcotic charge, was at my home posing as a B.C.I. Detective. Mr. Ferrarone subsequently gave a statement and report to the Assistant United States Attorney prosecuting my case, Daniel Beller. Mr. Keegan failed to diligently force the Government to produce this document. See United States vs. DeCoster, 487 F.2d 1197, 1204 (D.C.C.A. 1973), holding "the investigation should always include efforts to secure information and the possession of the prosecution in law enforcement authorities."

2. Philip E. Kirschen, Special Agent, Internal Revenue Service, Criminal Division, Newburg, New York office, was auditing my corporation, Berkshire Enterprises, Inc. as well as my personal income taxes since late 1974 or early 1975. I had been advised by Mr. Kirschen that my corporate taxes "seemed okay, but my personal income taxes would be referred to the criminal division for further study and computation.

Mr. Kirschen, IRS Agent, testified at my Narcotics Trial which allowed introduction of a Twenty Thousand Dollar (\$20,000.00) check introduced at my trial as Government's Exhibit "42". The only Government witness against me said that the check was used in a money-washing scheme to legitimize illegally-obtained money. The Government's star witness testified that he personally gave to

Fiumara, of Boston, Massachusetts, his money for this "Phoney Loan". The check was then given to me and I gave him the \$20,000.00. I demanded that Mr. Keegan question Mr. Kirschen about this check but Mr. Keegan refused. Not only did Mr. Keegan refuse to cross-examine Agent Kirschen but subsequently I was to learn that Mr. Keegan and Assistant United States Attorney, Daniel Beller, had stipulated this check's introduction into evidence. It should be noted that no legal instrument i.e. subpoena, summons, warrant has ever been issued to me or my Bank to obtain this check. There is no question that Mr. Keegan failed to contest the admissibility of this check even though he knew I was the only defendant who had standing to raise this issue.

The introduction of this check stipulated into evidence by David V. Keegan, trial counsel, was extremely detrimental to your appellant's case in that it provided the only corroborating evidence of government's witness, Jack Brown, and indicted accomplice with your appellant. Without this corroborating evidence appellants submit that the evidence from the stand would have been insufficient to sustain a conviction. Appellants submit that this stipulation was tantamount to a waiver of an essential defense vital to appellant's acquittal. Reece vs. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955) holding that defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

3. Peter J. Fiumara — briefly, it should be noted that Mr. Fiumara also testified at my trial and even though I insisted that Mr. Keegan question Mr. Fiumara and cross-examine him, Mr. Keegan again refused to do so. It should be noted that Mr. Fiumara took the stand after Mr. Kirschen and it can only be assumed that the illegally-seized check was used as a tracer back to Mr. Fiumara. Again, I point out to the court that all testimony and documentary evidence referred to above was introduced against me after the September 20th date at which Mr. Keegan had escorted me to have a conference with Mr. Daniel Beller.

Paragraph B — Failure to properly subpoena and produce various witnesses and documents. This court has already conceded that the Government's star witness, Jack Brown, suffered from a state of paranoia and other emotional disturbances. I demanded of my trial attorney, David V. Keegan, that we retain a psychiatrist for the purpose of examining Jack Brown personally or at least the statements furnished by the Government which showed Jack Brown's severe abuse of cocaine and heroin on a several-times-a-day basis. I was told by Mr. Keegan that the Judge had denied this request to us. Upon reading the opinion handed down by this court on co-defendants, I find this now not to be the truth, but it was in fact denied only to the CJA attorneys who requested more funds and expenses from the Government to pay all psychiatric expenses. This court in fact ruled that they found it interesting that none of the seven retained attorneys made this demand. I regard this action by Mr. Keegan as "deliberate deceit."

Prior to trial, I had asked that two subpoenas be issued to the office of the Clerk, United States District Court, Washington, D.C. and to the U.S. Attorney's Office in Washington, D.C. in the hopes that they might turn up information on Jack Brown. I felt and still do that these two subpoenas were imperative to my defense. I continually urged Mr. Keegan to do something about the subpoenas but he continually put me off by stating that he was too busy with other things and not now. One morning, after my suspicions were aroused, I asked an Assistant United States Attorney, Mr. Thomas Sear and Assistant United States Attorney, Ms. Constance Bushing, what happened to the subpoenas. They in turn advised me to ask Mr. Richard Dors, Law Clerk for the Honorable Judge Richard B. Owen. I asked Mr. Dors about this matter and he recalled the facts in event, telling me he believed the matter had been settled "in camera" and that he would give me the date and court exhibit numbers. This he did in fact do. Upon looking through this "in camera" discussion, I found that Mr. Keegan had conceded not to pursue the matter of the two subpoenas issued to the U.S. Attorney's office in Washington, D.C. as well as the District Court. In the case of MaKenna vs. Ellis, 280 F.2d 592 (5th Cir. 1960) it was held that "it is a basic fundamental of due process is that an accused person have a fair opportunity to tell his story in a fair trial. He is entitled to such notice of trial that he will be able to present his witnesses in court on the day of the trial." Certainly, if the court must give the defendant proper notice to produce such

witnesses and to present his story, then trial counsel's failure to produce witnesses and exhibits, having had the proper time, can only be construed as ineffective assistance of counsel. Finally, at my trial, I demanded that Mr. Keegan allow me to take the stand to testify in my own behalf. I asked Mr. Keegan if it was possible to submit a motion to the court to the effect that no testimony regarding my income tax audit be allowed. He said that the judge would deny it, however, without following the motion and therefore, without any ruling on it, I still insisted that I should take the stand to protect my record and that I would have to take the stand in order to deny the testimony of the only witness against me. Not doing so in this type of case would obviously be a disaster. However, Mr. Keegan refused to allow me to take the stand. In fact, he cautioned me not to do so. I knew that it would result in the disaster that occurred. The jury seemed to wait and see who would take the stand and acquitted only those who did in fact take the stand or had someone take the stand in their behalf. I believe there may have been one possible exception that of co-defendant Donald O. Dood.

As seen above, the decision of my trial attorney denied me of substantive right without my consent. As such, this denial can only be considered as ineffective assistance of counsel. People vs. Williams, 2 CAL. 3rd 894, and 471 P.2d p.1008 (1970).

Again, I call the court's attention to the fact that all of these events happened after September 20th date. It was also at this time that Mr. Keegan began to consistently complain to me and

my brother-in-law, Attorney Anthony Sutera, about his fees for such a lengthy trial period. He complained that we had taken him in; however, it should be pointed out to the court that Mr. Keegan named the retainer figure and terms to which I agreed and further point out to the court that Mr. Keegan was paid as per that agreement. His discontent surfaced, as did his irritability and refusal to discuss the case with me, as his client, or any members of my family. His attitude and irritability made communications and meaningful discussions about my case and my defense impossible.

Mr. Keegan persistently questioned my sister about the other juror who was with Mr. Keno on the day that Mr. Keno approached my sister. She repeatedly told him that she felt it was another one of the Histanic jurors. My sister made this feeling known that while she could not positively identify him, she was fairly certain. She felt surely the FBI or the U.S. Attorney's office would, through a full investigation, uncover all of the facts as did I. It is interesting to note that no person in authority has since questioned my sister about this entire affair yet it is my belief that the "investigation" is still going on. It should be noted this investigation began prior to September 20, 1976 and as of this date, Mr. Keno has still not been brought to trial nor do I believe any other arrests have been made.

I do not quarrel with Mr. Keegan's action in going to the U.S. Attorney's office or the trial judge about the jury tampering affair or the approaching of my sister by one of the jurors on September 17th, 1976. However, I feel that it was imperative, since

Mr. Keegan knew at that date he and I would no longer be able to communicate nor would he be able to effectively represent me, that he should have withdrawn as my attorney.

Certainly, if trial counsel should not be allowed to represent two defendants with antagonistic ideas and defenses, he cannot adequately represent a defendant who he perceives and knows to be in a conflict with himself.

CONCLUSION

I would also like to point out to the court that Disciplinary Rule 5-102 requires the withdrawal as counsel when the lawyer becomes a witness. It is obvious that Mr. Keegan realized that this would eventually become the case. Furthermore, I submit to this court that there was a complete breakdown of the attorney-client relationship at my trial which only worked to the prejudice of myself and my defense. Finally, I would ask that this court consider, knowing what it now knows the following ABA standards:

3.5(a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him.

1.6(b) * Whether privately engaged, judicially appointed or serving as part of a legal aid system, the duties of a lawyer to his client are to represent his legitimate interests, and considerations of

personal and professional advantage should not influence his advice or performance

For all of the above and the reasons enumerated in my brief, your appellant prays that this Honorable Court reverse his conviction; set an appeal bond at a reasonable amount; and grants any other relief it may deem proper.

Respectfully submitted,

Sebastian Intersimone
Sebastian Intersimone, pro se

CERTIFICATE OF SERVICE

I certify that I have served the foregoing brief on Mr. Daniel E. Beller, Assistant United States Attorney for the Southern District of New York, by depositing a copy of same, first class postage prepaid in the United States mails, properly addressed to him at Foley Square, 1 Federal Plaza, New York, N.Y. 10007 on this the 12th day of November, 1977.

Sebastian Intersimone
Sebastian Intersimone, pro se

Sworn to and subscribed before me
this 11th day of November, 1977.

Wanda Hawa

Notary Public, Georgia, State at Large
My Commission Expires May 25, 1981

